Supreme Court, U.S.
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No. 99-1081

IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF MULDROW, et al.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

JAMES C. MILTON *
LINDA C. MARTIN
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
SUITE 500
320 SOUTH BOSTON AVENUE
TULSA, OK 74103-3725
(918) 582-1211

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

Argument 1
The issue of whether 7 U.S.C. § 1926(b) should be construed narrowly or broadly was pressed and passed upon in the district court and the Tenth Circuit. 5

Argument 2
By prohibiting Muldrow from continuing to serve its current water-service customers, the Tenth Circuit's interpretation of Section 1926(b) would effect a taking of both Muldrow's customers and its ability to use its infrastructure 8

CONCLUSION 10

TABLE OF AUTHORITIES

Federal Cases

Allentown Mack Sales & Serv., Inc. v. National Labor Relations Bd., 118 S. Ct. 818 (1998) 7

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 7

Jefferson County Pharmaceutical Assn. v. Abbott Labs., 460 U.S. 150, *reh'g denied*, 460 U.S. 1105 (1983) 8

Lebron v. National Rr. Passenger Corp., 513 U.S. 374 (1995) 5, 6

Lexington-South Elkhorn Water Dist. v. Wilmore, 93 F.3d 230 (6th Cir. 1996) 1, 2

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) 7

Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978) 9

Rural Water Sys. # 1 v. Sioux Center, Nos. 98-4160, 99-2005, 2000 WL 62098 (8th Cir. Jan. 26, 2000) 3

South Dakota v. Yankton Sioux Tribe, 118 S. Ct. 789 (1998) 7

Stevens v. Department of Treasury,
500 U.S. 1 (1991) 6

Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622, *reh'g denied*,
512 U.S. 1278 (1994) 9

United States v. Pewee Coal Co.,
341 U.S. 114 (1951) 9

United States v. Williams,
504 U.S. 36 (1992) 6

Vance v. Terrazas,
444 U.S. 252, *reh'g denied*,
445 U.S. 920 (1980) 5

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 6

Federal Statutes

7 U.S.C. § 1926(b) 1, 4, 5

Other Authorities

Abbott B. Lipsky, Jr. & J. Gregory Sidak,
Essential Facilities, 51 Stan. L. Rev. 1187 (1999) 9

If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) *prior to the time an allegedly encroaching association begins providing service* in order to be eligible for Section 1926(b) protection.

— U.S. Court of Appeals for the Sixth Circuit, in *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230, 237 (6th Cir. 1996) (emphasis added).

* * * *

If the water district has made service available *to a pre-existing customer of a municipality* and the customer is located within the water district service area after becoming indebted, the statute grants the indebted water district the exclusive right to sell water to that customer during the life of the loan.

— Sequoyah County Rural Water District No. 7, in its Response to Petition for Writ of Certiorari, at p. 11 (emphasis added).

* * * *

INTRODUCTION

A comparison of the passages quoted above demonstrates the significant distinction between the Sixth Circuit's interpretation of 7 U.S.C. § 1926(b) and the interpretation argued by Sequoyah County Rural Water District No. 7 ("Sequoyah"), the Respondent in this case. The distinction is subtle because it depends on the complexities of circuit-made case law interpreting Section 1926(b). The significance of the distinction lies in the potential for manipulation of local governance, abuse by rural water districts, and loss of control by state regulatory authorities. This significant

distinction demonstrates the split between the Sixth and Tenth Circuits on the interpretation of Section 1926(b). This significant distinction also demonstrates the substantial question of public importance that is before the Court on the standard for interpretation of Section 1926(b).

Under the Sixth Circuit's approach, the elements of a rural water district's Section 1926(b) protection must be met before the competing municipality "begins providing service," or there is no Section 1926(b) protection. *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230, 237 (6th Cir. 1996). The *Lexington-South Elkhorn* court applied this standard only to the location of water lines – the "made service available" element of Section 1926(b) protection – because that was the element that was at issue in that case. The Sixth Circuit gave no indication in its decision that this approach would be applied with any less weight or vigor to other elements of Section 1926(b) protection, such as the rural water district's status as an "association," and the existence of qualifying federal indebtedness.

Sequoyah's approach to this issue turns Section 1926(b) on its head. With Sequoyah's interpretation of Section 1926(b), rural water districts could displace municipalities as water-service providers in broad geographic areas, including areas within the municipalities' corporate boundaries. Sequoyah's approach allows this result by extending Section 1926(b) protection to cover geographic areas that are served by municipalities prior to the funding date of the rural water district's federal loan. Sequoyah's approach would allow an even broader application of Section 1926(b) by allowing rural water districts to meet the other elements of Section 1926(b) protection after municipalities initiate service to water customers. For example, a private corporation that does not qualify as an association for purposes of Section 1926(b) could apply for and receive federal funds, lay water lines near municipal water customers, then later convert its charter to form a rural water

district that would qualify for Section 1926(b) protection.[1] Sequoyah's interpretation of Section 1926(b) would also allow a qualifying rural water association to run a water distribution line through a neighboring municipality, claim that it had made service available to the entire municipality, and attempt to wrench control of the municipality's water-service system based on the anticompetitive protection of Section 1926(b).

Sequoyah's broad approach to interpretation of Section 1926(b) is driven by a desire to spread the statute's protection as far as possible, beyond the reach and capacity of Sequoyah's water lines and beyond the reasonable expectations of neighboring water providers. Sequoyah's desire to extend Section 1926(b) protection so broadly is based on the extortionate value of Section 1926(b) protection held by rural water districts.

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[1] A variation of this example that is highly dependent upon Iowa law can be found in the very recent decision of the U.S. Court of Appeals for the Eighth Circuit, in *Rural Water Sys. # 1 v. Sioux Center*, Nos. 98-4160, 99-2005, 2000 WL 62098 (8th Cir. Jan. 26, 2000) (slated for publication in the Federal Reporter). In *Sioux Center*, the Eighth Circuit quoted and relied on the liberal-interpretation standard found in the Tenth Circuit's decision in this case. *Id.*, slip op. at *3. The *Sioux Center* court used the Tenth Circuit's liberal-interpretation standard to support a strained interpretation of Iowa statutory law that admittedly involved "excising words" from the Iowa statute. *Id.* at *2.

The Eighth Circuit's decision in *Sioux Center* also adds support to Muldrow's argument, at page 27 of its Petition for Writ of Certiorari, that the interests supporting Section 1926(b) disappear when the protected debt is repaid. On page *3 of its decision in *Sioux Center*, the Eighth Circuit determined that a customer trade between a rural water district and a municipality, later challenged by the rural water district on Section 1926(b) grounds, was not rendered invalid by Section 1926(b). "Although the statute was enacted to protect the government's security, the government's security was not impaired by this trade." *Sioux Center*, 2000 WL 62098, at *3.

Sequoyah has never served the disputed customers.[2] Sequoyah owes no duty to serve the disputed customers. In fact, Sequoyah likely has no intention of ever serving the disputed customers. If Sequoyah is granted an exclusive right to serve the disputed customers, these customers would be forced to build additional water lines and facilities so that Sequoyah could provide water service. The result is economic waste: Muldrow already provides water service to the disputed customers, and has done so since before Sequoyah was indebted to the federal government. Sequoyah hopes that it can use federal-court judgments enforcing this economic waste to force Muldrow to buy Sequoyah's right to serve the disputed customers.

In considering Muldrow's Petition for Writ of Certiorari, and in determining the proper standard for interpretation of 7 U.S.C. § 1926(b), the Court should take note of the extreme positions taken by Sequoyah in its Response. Sequoyah's extreme positions have been adopted by the Tenth Circuit with its liberal-interpretation standard and retroactive application of Section 1926(b)'s anticompetitive protection of rural water districts. These extreme positions severely impede state governments in the regulation of local water service.

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[2] In its Response, Sequoyah argues that it served water to "some of the customers until Muldrow disconnected them from the Sequoyah-7 system and connected the customers to the Muldrow system." [Response, at p. 2.] This assertion is contrary to the District Court's finding that "Sequoyah-7 does not contend it has provided water service to the disputed territory in the past. Nor does it contend that it is currently providing such service." [Appendix B, at p. 48a.] In its appeal to the Tenth Circuit, Sequoyah failed to challenge the District Court's finding on this factual issue. Furthermore, the record before the Tenth Circuit offers no support for Sequoyah's position on this factual issue. More importantly, the record is clear in its support for the finding by both the District Court and the Tenth Circuit that Muldrow began serving a number of the disputed customers before the funding of Sequoyah's September 28, 1994 federal loan. [Appendix A, at p. 5a.] Sequoyah's factual statement does not contradict this finding.

ARGUMENT 1

The issue of whether 7 U.S.C. § 1926(b) should be construed narrowly or broadly was pressed and passed upon in the district court and the Tenth Circuit.

Sequoyah is incorrect in arguing that Muldrow has waived its argument that Section 1926(b) should be construed narrowly, in a manner consistent with the Constitution and other federal statutes. The Court's decisions have recognized the Court's power to consider pertinent arguments on federal claims that are properly presented. *Lebron v. National Rr. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Vance v. Terrazas*, 444 U.S. 252, 258 n.5, *reh'g denied*, 445 U.S. 920 (1980). The Court's "traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*, 513 U.S. at 379 (internal quotations omitted; citations omitted).

Muldrow's position that the Tenth Circuit's interpretation of Section 1926(b) is inconsistent with congressional power and federal antitrust laws is not a new claim. At worst, Muldrow's argument on congressional power and federal antitrust laws is a new argument to support Muldrow's consistent claim: that Section 1926(b) should be construed narrowly to allow Muldrow to serve water to its current customers. Furthermore, the Tenth Circuit's interpretation of Section 1926(b) is based on a newly announced liberal-interpretation standard. As a result, any arguments against the new standard would by definition be new arguments.[3]

The standard for interpretation of Section 1926(b) is a question that was addressed by both the District Court and the

[3] Sequoyah offers no support for its suggestion that an argument or issue must be raised in a petition for rehearing or rehearing en banc at the circuit-court level in order to be raised in a petition for writ of certiorari. Petitions for rehearing on appeal are not jurisdictional requirements for requests for writs of certiorari from this Court.

Tenth Circuit. [Appendix A, at pp. 8a-10a; Appendix B, at p. 41a.] The Court's traditional rule "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see also Lebron*, 513 U.S. at 379. That "rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Williams*, 504 U.S. at 41; *see also Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

This rule is sensible in this case because the Tenth Circuit has adopted a new rule of construction that will govern all future cases in its jurisdiction involving Section 1926(b). A court's resolution of an issue of law is fairly presented for review, whether or not it was pressed by a party. There can be no doubt that in this case, the Tenth Circuit has announced a new and broad standard of construction for Section 1926(b). If allowed to stand, the Tenth Circuit's new standard for construction of Section 1926(b) will bind courts in all Section 1926(b) litigation in the Tenth Circuit. Furthermore, an appropriate review of the Tenth Circuit's new standard for construction of Section 1926(b) necessarily entails an analysis of the constitutional limitations on interpretation of the statute, as well as possible conflicts between the new standard and federal antitrust laws.

The most significant flaw in Sequoyah's Response is its misunderstanding of Muldrow's position on the constitutionality of Section 1926(b). Sequoyah asserts that Muldrow has argued that Section 1926(b) is unconstitutional. In reality, Muldrow has argued in its Petition that the Tenth Circuit's interpretation of Section 1926(b) is erroneous because the interpretation is inconsistent with constitutional constraints on congressional power.

The Court has long applied the rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the

intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Allentown Mack Sales & Serv., Inc. v. National Labor Relations Bd.*, 118 S. Ct. 818, 833 (1998) (Rehnquist, C.J., concurring in part and dissenting in part) (relying on *Edward J. DeBartolo Corp.*). This rule "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

In reviewing the Tenth Circuit's new liberal-interpretation standard for Section 1926(b), the Court would be obliged to consider whether the Tenth Circuit's interpretation is consistent with the Spending Clause power with which Congress enacted Section 1926(b). The Court should assume that Congress did not intend to exceed the scope of its Spending Clause power. The Court should also assume that Congress did not intend to facilitate an unconstitutional taking of municipally-owned infrastructure by enacting Section 1926(b). For these reasons the Tenth Circuit's interpretation of Section 1926(b) raises serious constitutional problems. The more appropriate interpretation of Section 1926(b), urged by Muldrow in its Petition for Writ of Certiorari, would avoid these constitutional problems.

Furthermore, to the extent that it is necessary to determine congressional intent in interpreting Section 1926(b), the Court must consider federal case law requiring narrow construction of statutes that provide exceptions to federal antitrust laws. In interpreting federal statutes, the Court assumes that when it passes legislation, Congress is aware of existing law, including basic rules of statutory construction. *South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 801 (1998); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Thus, the Court should assume that Congress was aware that an antitrust safe harbor such as Section 1926(b) would be construed narrowly, as required by this Court's

decisions, including *Jefferson County Pharmaceutical Assn. v. Abbott Labs.*, 460 U.S. 150, 159, *reh'g denied*, 460 U.S. 1105 (1983). The Court should assume that Congress intended Section 1926(b) to be interpreted in a manner consistent with such decisions.[4]

When the Court is presented with a claim that involves a federal statute, issues of statutory interpretation should never be outside the Court's reach. Sequoyah's argument to the contrary should be rejected.

ARGUMENT 2

By prohibiting Muldrow from continuing to serve its current water-service customers, the Tenth Circuit's interpretation of Section 1926(b) would effect a taking of both Muldrow's customers and its ability to use its infrastructure.

On pages 10 and 11 of its Response, Sequoyah argues that retroactive application of Section 1926(b) protection does not effect a taking of Muldrow's infrastructure because "[t]he infrastructure remains the property of Muldrow." [Response, at p. 10.] This argument demonstrates Sequoyah's narrow view of the interests at stake in this case, and the public interests at stake in Section 1926(b) litigation.

In addition to losing the use of its infrastructure, Muldrow would lose its established customers. Before Sequoyah received its September 28, 1994 loan, Muldrow had constructed water lines for the purpose of serving water customers that were not receiving water service from Sequoyah. [Appendix A, at pp. 4a-5a;

[4] Sequoyah's response to this issue includes a lengthy discourse on waiver of public rights. [Response, at pp. 7-9.] Sequoyah's argument on waiver of public rights is impertinent to Muldrow's argument that Section 1926(b) should be interpreted narrowly because it is an exception to federal antitrust laws.

Appendix B, at p. 48a.] At the time these water lines were constructed, Sequoyah had no Section 1926(b) protection against competition. [Appendix A, at p. 5a.] With the Tenth Circuit's decision in this case, the District Court could now determine that the disputed customers can no longer be served by Muldrow. With no customers to serve, the water lines constructed by Muldrow to serve the disputed customers would be rendered useless to Muldrow.

While some level of congressional involvement in the marketplace is within the constitutional powers of Congress, the Constitution does not allow unfettered congressional control of the market. Excessive congressional interference in the marketplace can implicate the Takings Clause. *See Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 684 (O'Connor, J., concurring in part and dissenting in part) (suggesting that congressional imposition of common-carrier-like obligations on cable operators may raise Takings Clause issues), *reh'g denied*, 512 U.S. 1278 (1994). The Court has held that the Government's seizure and direction of operation of a coal mine to prevent a national strike of coal miners constituted a taking. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). It has been suggested that injunctive relief apparently required by federal antitrust laws could constitute a permanent physical invasion that would be a per se taking under the Takings Clause. *See, e.g.*, Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1225 (1999).

While Congress has the power to regulate competition, that power should not extend to mandating the complete destruction of an existing relationship between a water provider and its customers, without providing a mechanism for compensation as required by the Takings Clause. Such a mandate would run afoul of the factors identified by the Court in *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978), for analysis of takings issues.

As explained above, the Court should assume that Congress knew the requirements of the Takings Clause and Court's approach

to takings analysis. The Court should assume that Congress did not intend to enact a statute that authorized a taking without a mechanism for compensation. For these reasons, the Tenth Circuit's interpretation of Section 1926(b) is incorrect.

CONCLUSION

Sequoyah is incorrect in its argument that Muldrow has waived its statutory-construction arguments. The interpretation of Section 1926(b), and the standard for its interpretation, have been "pressed and passed upon." Muldrow should not be limited to the precise arguments that it raised below on issues of statutory interpretation. More importantly, Sequoyah has failed to demonstrate that the Tenth Circuit's liberal interpretation of Section 1926(b) can be reconciled with federal antitrust laws and constitutional constraints on congressional power. The construction advanced by Muldrow in this case is more reasonable, more consistent with the text of the statute, and avoids the constitutional problems identified in the Petition for Writ of Certiorari.

/s/_____
JAMES C. MILTON, ESQ.
Counsel of Record

Linda C. Martin, Esq.
Doerner, Saunders, Daniel
& Anderson, L.L.P.
320 South Boston Ave., Ste. 500
Tulsa, Oklahoma 74103-3725
(918) 582-1211

Attorneys for Petitioners